STATE OF MICHIGAN

COURT OF APPEALS

VIRGINIA JOLIET,

Plaintiff-Appellee,

v

GREGORY E. PITONIAK and FRANK BACHA,

Defendants-Appellants,

and

JAMES ARANGO,

Defendant.

UNPUBLISHED
August 31, 2004

No. 247590
Wayne Circuit Court
LC No. 01-140733-CZ

Before: Neff, P.J., and Smolenski and Zahra, JJ.

PER CURIAM.

Defendants appeal by leave granted the trial court's order denying their motion for summary disposition, and concluding that the statute of limitations did not bar plaintiff's claims of age and gender discrimination, sexual harassment, and breach of contract against the mayor of the city of Taylor and the former executive director of the department of public works. We affirm.

Defendants argue that the trial court erred in denying their motion for summary disposition pursuant to MCR 2.116(C)(7) because plaintiff's complaint was filed more than three years after her cause of action accrued, i.e., the last day she actually worked for the city of Taylor. We disagree.

We review a trial court's grant of a motion for summary disposition pursuant to MCR 2.116(C)(7) de novo to determine whether the moving party was entitled to judgment as a matter of law. *Blazer Foods, Inc v Restaurant Properties, Inc*, 259 Mich App 241, 244-245; 673 NW2d 805 (2003). Absent a disputed issue of fact, whether a cause of action is barred by a statute of limitations is a question of law, which we review de novo. *Van Reken v Darden, Neef & Heitsch*, 259 Mich App 454, 456; 674 NW2d 731 (2003).

> In reviewing a motion under MCR 2.116(C)(7), this Court accepts as true the plaintiff's well-pleaded allegations and construes them in the plaintiff's favor. This Court considers the pleadings, affidavits, depositions, admissions, and documentary evidence filed or submitted by the parties to determine whether the claim is barred by law. [*Blazer Foods, supra* at 245 (citations omitted).]

It is undisputed that plaintiff worked for the city onsite in Taylor for the last time on November 23, 1998. According to plaintiff's affidavit, submitted in response to the motion for summary disposition, and other supporting evidence, she took vacation from Tuesday, November 24, through Monday, November 30, 1998. During her vacation, plaintiff was on-call to the staff at the city and accessed her computer in the mornings to check on the status of the city's computer network. On Monday, November 30, 1998, plaintiff mailed her letter of resignation to defendant mayor, and the letter stated that plaintiff's resignation was effective December 1, 1998.

Defendants, citing *Parker v Cadillac Textron, Inc*, 214 Mich App 288, 290; 542 NW2d 365 (1995), argue that the last day of plaintiff's employment was November 23, 1998, and the fact that plaintiff was on vacation for the remainder of the week does not alter that fact. In *Parker*, three employees were laid off and a dispute arose regarding when the statute of limitations on their claim for discriminatory discharge began to run. *Id.* at 289-290. The employees' last day of work was December 21, 1990, but some of the employees' records mistakenly indicated that January 4, 1991, was the last day worked and the records also stated that January 7, 1991, was the "effective date of separation." *Id.* at 289. The *Parker* Court held that a claim for discriminatory discharge accrues on the date the plaintiff is discharged and the last day worked is the date of discharge. *Id.* at 290. Subsequent severance or vacation pay does not affect the date of discharge. *Id.* Unlike the employees in *Parker*, however, evidence in this case indicated that plaintiff continued to perform duties for the city of Taylor after November 23, 1998, and thus her last day of work, i.e., the day her claim accrued, was November 30, 1998.

This conclusion is supported by the recent decision in *Collins v Comerica Bank*, 468 Mich 628, 632; 664 NW2d 713 (2003), in which the Court observed that the last date worked is not necessarily the date that a cause of action for discriminatory discharge accrues. In *Collins*, the employee was suspended on September 5, 1996, and required to be available during normal working hours while an investigation into her conduct was completed. *Id*. at 629. Defendant later terminated the plaintiff's employment on September 25, 1996. *Id*. at 630. The Court held that the plaintiff's claim for discriminatory termination did not arise until the date she was discharged. *Id*. at 634. The Court reasoned that if a discharge has yet to occur, it cannot be said that the last day worked represents the discharge date. *Id.* at 633.

Similarly, in *Jacobson v Parda Federal Credit Union*, 457 Mich 318, 321, 328; 577 NW2d 881 (1998), the Court focused on the date of resignation in determining the date the employee was constructively discharged for purposes of filing her claim under the Whistleblowers' Protection Act.[1] The Court declined to depart from the longstanding rule that a

[1] MCL 15.361 *et seq*.

discharge occurs when a reasonable person in the employee's place would feel compelled to resign. *Id*. at 328. Generally, discharge must be viewed as occurring at the moment of resignation. *Id*. "Until the employee resigns, the employer's action has yet to prove to be one of discharge." *Id*. at 327.

Even if plaintiff's last day of onsite work was November 23, 1998, that date preceded the date of her separation from the city of Taylor and does not act as the date her cause of action accrued. Accordingly, plaintiff's complaint, filed on November 30, 2001, was filed within the three-year statute of limitations. Therefore, the trial court did not err in denying defendants' motion for summary disposition under MCR 2.116(C)(7).

Because we conclude that plaintiff's complaint was timely filed, we need not address whether the continuing violations doctrine applies to extend the statute of limitations. Similarly, we need not address defendants' argument that plaintiff's breach of contract claim does not extend the limitations period.

Affirmed.

/s/ Janet T. Neff
/s/ Michael R. Smolenski